Supreme Court, U.S.
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No. 00-551

IN THE
Supreme Court of the United States

OSWALD S. RUSSELL,
Petitioner,

v.

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC., AND FLAGSHIP AIRLINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly ruled, as a matter of law, that petitioner's employer maintained reasonable procedures to prevent and correct harassing behavior, and did not have timely notice that Petitioner believed he had been subjected to racial harassment.

STATEMENT PURSUANT TO RULE 29.1

The successor to Respondent Flagship Airlines, Inc., is American Eagle Airlines, Inc. The parent company of Respondent American Eagle Airlines, Inc., is AMR Eagle Holding Corporation. The parent company of AMR Eagle Holding Corporation and of Respondent American Airlines, Inc., is AMR Corporation. American Airlines, Inc., was dismissed in the district court. None of the Respondents has any non-wholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, by their undersigned counsel, submit this brief in opposition to the petition for a writ of certiorari in this case. The district court decision at issue is reported at 46 F. Supp. 2d 1330.

STATEMENT OF THE CASE

This petition seeks review of a *per curiam* decision affirming summary judgment for Respondent Flagship Airlines, Inc. ("Flagship"),[1] on claims by petitioner Oswald

[1] At the time of the alleged incidents, Russell's employer was Flagship Airlines, Inc. American Eagle Airlines, Inc., is Flagship's successor. (Pet. App. B at 5a, n.1.) All references herein to Russell's employer will be to Flagship.

Russell ("Russell") that he had been subjected to racial harassment in violation of Title VII and §1981. The district court properly concluded that Flagship did not have the opportunity to enforce its anti-harassment policy for preventing and remedying harassing behavior because Russell elected not to notify the company that he believed he had been harassed. (Pet. App. B at 24a-26a.)

The court of appeals' *per curiam* affirmance raises no important or controversial federal question. (Pet. App. A.) Moreover, there is no con-flict among the circuits on any of the issues Russell seeks to present, and no conflict with any decision of this Court. Accordingly, further review is not warranted, and Flagship respectfully submits that the petition for a writ of certiorari should be denied.

A. Russell's Lawsuit

Russell, who is African-American, was an aircraft mechanic employed by Flagship. (Pet. App. B at 5a.) Russell filed this action in February 1998, bringing claims under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e *et seq.*), and Section 1981 (42 U.S.C. §1981). (*Id.* at 6a.) Russell's claims arose from his discharge in December 1996, after he committed an error that resulted in a serious flight safety incident. Russell also alleged in his complaint that in December 1993, more than four years before he filed his lawsuit, he was wrongfully demoted from lead mechanic to mechanic. Russell further alleged several incidents of racially harassing behavior by unidentified perpetrators against himself and other employees, which allegedly occurred at unspecified times prior to February 1995. (*Id.* at 7a-8a.)

The petition addresses only Russell's hostile work environment claim.

B. The Employment Decision Underlying this Action—Russell's Discharge in December 1996

The employment decision that prompted this action was Russell's discharge in December 1996 for failure to secure a "cowling" (or cover) for an aircraft engine, which resulted in the aircraft's emergency landing, and potential endangerment of the aircraft, passengers, crew, and persons on the ground. (*Id.* at 7a.) After investigation of the incident, Russell was discharged.[2] (*Id.* at 7a-8a.) Russell filed a grievance under a collective bargaining agreement with Flagship, and filed a charge of discrimination with the EEOC. (*Id.* at 8a.)

Notably, Russell did *not* include in his EEOC charge any allegations that he had been subject to racial harassment during his employment with Flagship. (*Id.* at 8a.) Moreover, although the collective bargaining agreement prohibits racial discrimination, and Russell was represented by counsel at the hearing on his union grievance, Russell did *not* raise any allegations of racial harassment in the hearing conducted by a neutral arbitrator regarding his discharge.[3] (Def.'s Mot. for Summ. J. at 5 & App. Tab A.)

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[2] Flagship actually issued a "Career Decision Day" advisory, which is an advisory reserved for serious disciplinary measures when discharge might be in order but where a "last chance" is offered. This advisory offers the employee the options of: (1) signing a Letter of Commitment to return and correct performance issues; (2) resigning with an offer of severance pay; or (3) accepting discharge with the right to file a grievance under the collective bargaining agreement. Russell opted for discharge with the right to file a grievance. (Pet. App. B at 8a.)

[3] The arbitrator determined that Russell had been negligent in failing to secure the cowling. The arbitrator ruled that Russell could be reinstated to employment only if he would sign the Letter of Commitment Flagship originally offered to him in December 1996. In February 1999, Russell signed the Letter of Commitment, and returned to work as a mechanic with Flagship's successor, American Eagle Airlines, Inc. (Pet. App. B at 9a.)

C. Russell Failed to Notify Flagship of Alleged Racial Harassment, Despite Multiple Opportunities to Complain

The first time Russell raised allegations of racial harassment was as part of the Complaint filed in this action, in February 1998.[4] The district court found that Russell failed to notify Flagship that he believed he had been subjected to racial harassment, despite multiple opportunities to complain. (Pet. App. B at 25a-26a.)

1. *Russell Failed to Notify Flagship of Alleged Racial Harassment in his February 1994 EEOC Charge*

In February 1994, Russell filed a charge of discrimination with the EEOC, claiming that, in December 1993, he had been demoted from lead mechanic to mechanic based on racial discrimination. (*Id.* at 7a.) Russell did *not* state any allegations of racial harassment in his EEOC charge. (*Id.* at 26a.) Moreover, Russell did not discuss any incidents of racial harassment with Flagship when he traveled to Nashville in connection with a grievance he filed over his demotion. (*Id.*) Russell received a right to sue letter from the EEOC in June 1996, but abandoned his claim. (*Id.* at 7a.)

2. *Russell Failed to Notify Flagship of Alleged Racial Harassment During a September 1994 Investigation by Flagship*

In September 1994, Russell was interviewed by Flagship's human resources department in Nashville as part of an

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[4] Russell's broad assertions of alleged harassing behavior in the petition are not supported by the evidence that was before the district court. Flagship does not further address this matter here, however, because the issue of whether Russell could create a genuine factual issue as to an actionable hostile work environment was not the basis for the district court's decision. (Pet. App. B at 23a.)

extensive investigation into vague allegations of racial discrimination at Flagship's Miami's maintenance facility, which had been submitted by a white employee during an unemployment hearing. (Def.'s Mot. for Summ. J. at 19; Def.'s St. of Undisputed Facts at ¶¶ 60-61.) At the September 1994 meeting, Russell did not disclose that he thought he had been subjected to racial harassment. (*Id.*) Russell mentioned *only* the Polaroid picture described in his petition, and offered no evidence that might have assisted Flagship in finding the source of the picture or evidence of any other incidents. (*Id.*) Furthermore, in January 1995, when Russell's attorney contacted Flagship's counsel indicating there might be additional evidence of harassment directed at other employees, Flagship invited Russell and his attorney to again travel to Nashville. (Pet. App. B at 26a.) Russell declined even to respond. (*Id.*)

3. *Russell Failed to Notify Flagship of Alleged Racial Harassment in the Arbitration of His Grievance or in his December 1996 EEOC Charge in Connection with his Discharge*

Moreover, as set forth above, Russell did not raise any alleged harassing incidents in the EEOC charge he filed in December 1996, claiming that his discharge for the "cowling" incident was racially motivated. Moreover, Russell did not mention any racial harassment in the arbitration of the grievance he filed in relation to his discharge.

D. Flagship Developed, Distributed, and Implemented an Anti-Harassment Policy, Which Included Internal Complaint Procedures

Flagship has an established policy against discrimination and harassment on any legally protected basis which it distributes to its employees, through its Employee Handbook. The policy provided that employees should report alleged

discrimination or harassment to Flagship's Personnel Director. (Pet. App. B at 24a.)

Russell admitted that he knew of Flagship's policy and complaint procedure, and admitted that he knew of the grievance procedure available to him under the collective bargaining agreement that also prohibited discrimination and harassment. (*Id.*; Def.'s St. of Undisputed Facts at ¶¶ 50-51.) Indeed, Russell's internal complaint about his demotion in December 1993 resulted in a company investigation of that employment decision. (Pet. App. B at 26a.)

Moreover, allegations of racial discrimination raised by a white employee during an unemployment proceeding in September 1994 resulted in an extensive investigation of the entire maintenance facility in Miami. (Def.'s Mot. for Summ. J. at 19; Def.'s St. of Undisputed Facts at ¶ 60.) Even though Flagship found no evidence of racially discriminatory decisions and received no evidence identifying any perpetrators of harassing conduct, in order to deter potentially harassing acts in the future, Flagship's President issued a memorandum in February 1995 to all employees re-emphasizing the policy that any proven racially hostile actions would result in immediate discharge. (*Id.* at 63.) There is no evidence that any of the racially harassing incidents alleged by Russell occurred after that time period.

E. The Proceedings Below

The district court granted summary judgment for Flagship on all of Russell's claims. (Pet. App. B at 27a.) Specifically, with respect to Russell's hostile work environment claim, the district court held that Russell "failed to present any evidence to create a material issue of fact as to [Flagship's] affirmative defense under *Faragher v. City of Boca Raton*." (*Id.* at 23a.) Rather, the district court held that, as a matter of law, Flagship had met both conditions of the *Faragher* defense. First, the undisputed evidence showed that Flagship sufficiently disseminated an anti-harassment policy with a

complaint procedure to its employees, and that Russell admittedly knew about the policy. (*Id.* at 24a-25a.) Second, there was no evidence to show that Russell ever brought the incidents that allegedly created the hostile work environment to the attention of Flagship through the internal complaint procedures, despite "ample opportunities to do so." (*Id.* at 25a-26a.)

After full briefing and oral argument, the court of appeals affirmed the district court's decision, for "the reasons indicated by the district court." (Pet. App. A at 1a-2a.)

ARGUMENT

Russell seeks to have this Court review narrow issues of fact relating to his failure to complain about alleged racial harassment. The *per curiam* decision of the court of appeals, affirming summary judgment for Flagship, is not inconsistent with any decision of this Court or any decisions of other federal courts of appeals. Further review is not warranted.

I. THE COURTS BELOW CORRECTLY REJECTED RUSSELL'S CLAIMS OF RACIAL HARASSMENT BECAUSE FLAGSHIP DID NOT HAVE NOTICE OF HIS CLAIMS, AND BECAUSE IT EXERCISED REASONABLE CARE TO PREVENT AND PROMPTLY CORRECT HARASSING BEHAVIOR

The record evidence clearly supported the district court's finding that Flagship had a well-publicized harassment policy and complaint procedure, of which Russell admittedly was aware. (Pet App. B at 24a-25a.) Although Russell quibbles that Flagship could have provided a different complaint procedure, or could have provided earlier training sessions to employees (Pet. at 8), he does not and cannot cite any case that allows an employee to dictate the nature of an employer's anti-harassment program. Indeed, the Court has recognized that promulgation of an anti-harassment policy, with a

complaint procedure allowing an employee to bypass a harassing supervisor, generally will suffice to meet the first prong of the employer affirmative defense to vicarious liability. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). Moreover, the evidence showed that Flagship appropriately responded to complaints made by other employees in September 1994, and that no racial harassment has been alleged after such time period.

Second, the record evidence clearly supported the district court's finding that Russell failed to notify Flagship of his view that he believed he had been subjected to racial harassment. (Pet. App. B at 25a-26a.) Indeed, Russell's failure to inform Flagship of his view that he had been subjected to racial harassment is vividly evident in the record. Not only is there no direct evidence of such notice, but the record also establishes that Russell made no reference to alleged harassing incidents in his 1994 EEOC charge regarding his demotion, or in the investigation or grievance of his demotion claim, or in his 1996 EEOC charge regarding his discharge, or in the arbitration of the grievance relating to his discharge. In addition, although Russell provided a Polaroid picture during the 1994 investigation, he had not previously reported its appearance in the workplace, and offered no assistance in identifying its source. The district court properly found that Russell's silence on each of these occasions constituted an unreasonable failure to take advantage of the corrective opportunities provided by Flagship. *See Faragher*, 524 U.S. at 778 (employee's failure to use complaint procedure normally will suffice to satisfy second element of employer's defense); *see also Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir.), *cert. denied*, 121 S. Ct. 303 (2000).

II. THE DECISION, BELOW IS CONSISTENT WITH *FARAGHER V. CITY OF BOCA RATON*, AND SUBSEQUENT DECISIONS OF THE COURTS OF APPEALS APPLYING *FARAGHER*

A. The Lower Courts' Decisions Are Consistent with this Court's Decision in *Faragher*

Russell asserts that the decisions below conflict with *Faragher* and with subsequent court of appeals decisions applying that case. (Pet. at 4.) This is incorrect. Both the legal standards and the factual approach adopted by the district court are consistent with *Faragher* and its progeny.

Indeed, the alleged *Faragher* conflict is nothing more than Russell's disagreement with the district court's conclusion that Flagship exercised reasonable care to prevent and correct promptly any harassing behavior. (Pet. App. B at 23a-24a.)[5] This factual quarrel with the court's conclusion is not a "conflict," and certainly not one appropriate for review in this Court.

In fact, Flagship's harassment policy, as described above, was consistent with *Faragher*'s requirements. Russell's significant shortcoming was his own repeated failures to notify Flagship that he believed he had been subjected to racial harassment. Russell elected not to come forward even after Flagship actively involved him in an investigation of his earlier charge of employment discrimination, and in an investigation of allegations made by another employee. The *Faragher* focus on the reciprocal responsibilities of the employer and the employee to deal with issues of

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[5] Russell's argument for review in this Court is grounded in his belief that there "were issues of fact . . . making summary judgment inappropriate." (Pet. at 9.) This argument only serves to underscore that the district court's decision does not conflict with legal precedent, and that Russell merely disagrees with the district court's assessment of the factual record.

employment discrimination was intended to avoid just this situation, where an employee first communicates his claims when files his court complaint. *See generally Faragher*, 524 U.S. 775.

B. The Lower Courts' Decisions Are Consistent with Subsequent Decisions of the Courts of Appeals Applying *Faragher*

There is no conflict between this case and the cases that have followed *Faragher*. To the contrary, the three decisions cited by Russell support the correctness of the decisions that are the subject of this petition.

The court of appeals' decision in *Coates v. Sundor Brands*, 164 F.3d 1361 (11th Cir. 1999), is remarkably similar to the present case in background, rationale, and outcome. The court there concluded that the employee did not properly put the employer on notice of the problem in a timely fashion, and when notice eventually was given, the employer responded reasonably to the complaint. *Id.* at 1365-66. The Eleventh Circuit emphasized a point made by this Court in *Faragher*—that employers and employees both have responsibilities to correct workplace harassment:

> Federal law has now attempted to correct the problem of workplace discrimination, but it cannot be done without the cooperation of the victims, notwithstanding that it may be difficult for them to make such efforts. When an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to correct the problem.

Id., at 1366.[6]

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[6] Similarly, in *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir.), the court of appeals held that it is incumbent on employees to

Russell also cites a Sixth Circuit decision and a Ninth Circuit decision as allegedly inconsistent with the ruling below. (Pet. at 5-6). In fact, the courts of appeals, in those cases, as here, similarly analyzed notice and response to determine employer liability. The different outcomes in the Sixth and Ninth Circuit cases do not give rise to any conflict; they merely reflect the different facts of those cases.

In *Moore v. Kuka Welding Sys. & Robot Corp.*, 171 F.3d 1073 (6th Cir. 1999), the plaintiff was subject to racial slurs and jokes as part of the "every-day banter" in the workplace. *Id.* at 1079. The court of appeals ruled that the employer was "on notice" of the conduct because a supervisor observed and in some instances contributed to the offensive conduct, yet the employer "did little to correct [the] problem." *Id.*

In *Yamaguchi v. United States Air Force*, 109 F.3d 1475 (9th Cir. 1997),[7] it was undisputed that the plaintiff properly followed the employer's procedures to complain that she had been subject to sexual harassment (her complaint included allegations of forcible rape). *Id.* at 1483. Although the alleged perpe-trator was assigned to a different base than plaintiff, he was not officially disciplined. *Id.* at 1479, 1483. The Ninth Circuit affirmed the district court's denial of summary judgment on the issue of employer liability because a factual dispute remained as to whether the actions taken in response to the plaintiff's complaint were adequate remedial measures. *Id.* at 1483.

Here, in contrast to *Moore* and *Yamaguchi*, the evidence is undisputed that Russell did *not* notify Flagship that he believed he was subjected to racial harassment, despite Russell's admitted knowledge of Flagship's anti-harassment

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use the articulated procedures that the employer makes available to redress acts of discriminatory hostility, and that failure to do so is fatal to a later claim in court.

[7] *Yamaguchi* was decided before this Court's decision in *Faragher*.

policy and ample opportunity to complain. Moreover, when other harassment allegations were brought to Flagship's attention by another employee, the harassment was not tolerated by Flagship. Rather, Flagship immediately launched an investigation, and re-emphasized its policy against harassment despite its conclusion that no adverse employment action had occurred. The fact that there are no allegations of harassment after this time period demonstrates the effectiveness of Flagship's response.

C. The Questions Presented Already Have Been Addressed in *Faragher*, and Do Not Justify Russell's Requested "Clarification"

Russell makes the conclusory assertion that "[t]he questions presented [by the petition] are important." (Pet. at 9.) The basis for this alleged importance is not clear, but appears to be based on Russell's perception of a need for some sort of "clarification" of the standards under which an employer can be held vicariously liable for an actionable hostile work environment. (Id.)

This Court already has addressed, in detail, the standards for employer liability in *Faragher*, and in the companion decision of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). There is nothing in the petition, other than Russell's unsupported assertions, to suggest that the lower courts here in any way deviated from these standards. Moreover, this case does not provide an appropriate opportunity for further discussion of questions of harassment policy awareness, and employer notice and response, because Russell was indisputably aware of the policy, yet elected not to bring his allegations to the attention of his employer.

The decision below is consistent with the policy objectives of *Faragher*—*i.e.*, that employers should have a procedure to respond to notice that harassment may be taking place,

employees should use those procedures, and employers should deal effectively with the results of their investigations. Nothing in the decision below is incompatible with those objectives. If anything, the lower courts' rulings point up the importance of a well-publicized procedure and the importance of timely employee complaints.

D. There is No Support for Russell's Assertion That the Decision in this Case Will Have "A Particularly Debilitating Effect on Minority Employees"

Finally, Russell asserts that the decision below sets some unspecified standard that will have a "particularly debilitating effect on minority employees." (Pet. at 10.) This assertion, and Russell's corresponding assertion that "most employees are not willing due to fears of retaliation to [go over the head of the base manager] to file a complaint of this nature with the personnel director for [Flagship]" (*id.*), are unsupported by any evidence or common experience.

To the contrary, court decisions subsequent to *Faragher* support the efficacy of anti-harassment policies that provide for making complaints *outside* an employee's chain of command. *See, e.g., Madray*, 208 F.3d at 1299 (complaint procedure allowed employee to complain to persons other than supervisor); *Ritchie v. Stamler Corp.*, 2000 WL 84461 at *3 (6th Cir. Jan. 12, 2000) (procedure required complaints to be made in writing to president of the company); *Watkins v. Professional Security Bureau, Ltd.*, 1999 WL 1032614 at *2, 4 (4th Cir. Nov. 15, 1999) (procedure encouraged employees to contact the director of human resources); *see also EEOC Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, at (C)(1)(c) ("[a]llowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner").

The decisions in this case did not deviate in any way from the established law of employer liability for harassment, and, thus, this case will have no far-reaching implications

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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